In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-548

STEVEN HAMILTON, *Petitioner*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

Petitioner's misdemeanor contempt conviction was affirmed by the Appellate Department of the Superior Court of Alameda County, State of California. Certification to the Court of Appeal was denied. The opinion is unreported and appears as Exhibit B to the petition.

Prior to the trial, petitioner sought a writ of prohibition from the Superior Court, contending that the pretrial publicity order was constitutionally invalid. The petition was denied on July 6, 1967. The denial was affirmed by the California Court of Appeal in a reported opinion. *Hamilton v. Municipal Court*, 270 Cal.App.2d 797 (1969), *cert. denied*, 396 U.S. 985 (1969). The opinion appears as Exhibit A to the petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code section 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner's contempt conviction may be upheld where the record reveals (1) a valid pretrial publicity order issued upon a factual showing that pretrial publicity attending petitioner's sit-in trial posed a clear and present danger of preventing a fair trial; and (2) a deliberate violation of that order by petitioner.

2. Whether the factual record presented herein is an adequate one for this Court to resolve an important constitutional issue involving the balance between the right to a fair trial and freedom of speech.

STATUTES INVOLVED

The First, Sixth and Fourteenth Amendments to the United States Constitution.

California Penal Code section 166(4):

> "Every person guilty of any contempt of court, of either of the following kinds is guilty of a misdemeanor:
>
> "4. Willful disobedience of any process or order lawfully issued by any court;"

STATEMENT OF THE CASE

The record consists of the settled statement on appeal plus numerous newspaper clippings introduced into evidence by petitioner at the contempt trial.[1] Our summary thereof follows:

By a complaint filed on November 30, 1966, in the Municipal Court for the Berkeley-Albany Judicial District, petitioner, and others, were accused of violating Penal Code section 372, committing a public nuisance, and section 602(1), unlawful occupation of real property or structures. These misdemeanor charges grew out of a widely publicized demonstration on the campus of the University of California at Berkeley, protesting the presence of recruiters for the armed services of the United States.

A pretrial hearing was held on December 16, 1966.[2] In order to secure a fair trial for all parties, and after discussion with the prosecutor and defense counsel, in petitioner's presence, the Court entered its order, providing in pertinent part as follows:

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[1]The contempt trial was not before the same judge who issued the pre-trial publicity order. *Cf., Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

[2]Only two days earlier, on December 14, 1966, the Berkeley Daily Gazette reported that upon entering not guilty pleas to the trespass and nuisance charges, on December 13, 1966, petitioner and his cohorts distributed a mimeographed statement which declared:

> "[T]he university is making us scapegoats. Our arrest is a political arrest; this will be a political trial.
>
> "There were students who were leaders in the demonstration who were not arrested, and some non-students arrested who were clearly not in the leadership of the action.
>
> "The six of us arrested have one thing in common—we are all non-students and we have been previously active in political events that have been embarrassing to the administration."

"*Pretrial Publicity*

"To assure a fair trial in this case it is essential to keep pre-trial publicity to an absolute minimum. Therefore, and in accordance with the discussion between the court and counsel in the presence of the defendants in open court this day,

"A. The parties shall not, directly or indirectly, release to any news media information or opinion concerning the trial or any issue likely to be involved therein, other than the date and place of trial, the names of the parties and counsel, the contents of the complaint, and the plea of defendants. Specifically, and without limitation, there shall be no public statements or releases concerning the merits of the complaint, the evidence or arguments to be adduced by either side, or trial tactics or strategy.

"B. This order shall apply *inter alia* to the parties and their counsel, to all law enforcement agencies, to the regents of the University of California and their agents and employees, and to the Associated Students of the University of California, their members and affiliated organizations.

"The Court recognizes the difficulties inherent in framing any order in this matter and expects the full cooperation of the parties and their counsel in carrying out the letter and the spirit of this order. The Court will entertain motions for any farther orders that may be necessary or desirable in this matter."

Trial was set for Monday, January 16, 1967. On the preceding Friday, January 13, in front of the Berkeley-Albany Courthouse, where the trial was to take

place, petitioners held a press conference. They issued "FOR IMMEDIATE RELEASE" this statement:

> "'We have decided to speak to the Press for the following reasons:
>
> "'1. The gag rule comes after the University, Sacramento, and powerful interests in the State have prejudiced people against us.
>
> "'2. We cannot accept the precedent of a gag rule against the defense in political trials where it would be especially prejudicial because the prosecution always attempts to hide political activities behind legal language.
>
> "'3. We were arrested as scapegoats in a constitutionally protected political demonstration—arrested not because of what we did that day, but because we have all been active in effective movements against the war, University autocracy, and racism.
>
> "The reason for this press conference is that we are making an attempt to ensure ourselves a fair and public trial. A recent ruling by the Supreme Court reversed the conviction of Sam Sheppard on the basis that pre-trial publicity on the part of the prosecution made it impossible for Sheppard to get a fair trial. It was felt that the jury had to be prejudiced against Sheppard.
>
> "Judge Brunn, in ordering both the prosecution and the defense to desist from participating in pre-trial publicity, was we feel acting sincerely in an attempt to guarantee us a fair trial. But the effect of his ruling is the reverse. The harm against us is already done; the jury has already been prejudiced. The University, both governors, and hostile elements in the community have already given to the people of California a false

view of what occurred. We have been publicly branded a small group of outside agitators who planned in advance and then provoked the events which culminated in the student strike. If this is the only view that the public is allowed to hear, how could a jury help but be prejudiced? We must speak to the press. We must give the people of the State of California our view of the events. This will not guarantee a fair trial, but it will at least make one more possible.

"Nobody planned in advance the sit-in that occurred. The University had in the past permitted picketing of military tables. How could we have known that they would tear up picket signs this time? How could we have known that, when a football player would strike a protestor, the University police would arrest the person struck and not the assailant? It was events such as these that provoked the sit-in, by their nature, they could not be planned in advance.

As to the sit-in itself, some of those arrested did play a leading role in it. However, some played no role. There were also many students in leadership positions. None of these were arrested. The reason we were singled out is that we have in the past participated in activities on the Campus that the University disapproved of and found embarrassing, such as Vietnam Day and Black Power Day. This is, then, clearly a case of political persecution.

"As to our rights to be active politically on the Campus; we feel that these are fully protected by the Constitution. The right of free political expression and association are supposed to be the inalienable rights of all citizens. When we enter

> the Campus of the University of California, we do not surrender our citizenship. It is therefore unconstitutional to demand that we surrender our political rights. Some of the most significant political events in the country have occurred at the University of California. We believe we have not only a legal right but also a moral duty to participate in them."

On the day petitioners held their press conference, they were arrested and charged with statutory criminal contempt, in violation of Penal Code, section 166(4). That section makes "willful disobedience of any process or order lawfully issued by any Court" a misdemeanor.

On January 16, 1967, petitioners were tried and convicted on the original charges.

On March 1, 1967, petitioners demurred to the contempt complaint. Their demurrer was overruled on March 27, 1967. Petitioners next applied to the Superior Court of Alameda County for an alternative writ of prohibition staying their trial for contempt. The alternative writ was issued on June 19, 1967. The matter came on for hearing and on August 25, 1967, final judgment was entered denying the petition for a peremptory writ of prohibition, the alternative writ being discharged. On March 20, 1969, the California Court of Appeal affirmed the judgment of the Superior Court. On May 14, 1969, the California Supreme Court denied petitioners' application for a hearing without opinion. A petition for a writ of certiorari was denied by this Court on December 15, 1969. 396 U.S. 985 (1969).

The contempt trial was held on March 12, 1970. The evidence consisted of petitioner Hamilton's testimony and numerous press clippings introduced by him. On March 31, 1970, petitioner was found guilty of contempt.

ARGUMENT

I

THE RECORD DOES NOT PROVIDE AN ADEQUATE FACTUAL FRAMEWORK FOR RESOLUTION OF THE IMPORTANT CONSTITUTIONAL ISSUE OF STRIKING A PROPER BALANCE BETWEEN FREE SPEECH AND FAIR TRIAL.

The settled statement on appeal was prepared by petitioner's present counsel. It was certified as the record on appeal by the trial judge. The district attorney did not object, but neither did he stipulate to the statement.

According to the settled statement, petitioner testified that the statement of January 13, 1967, in violation of the pretrial publicity order, was issued only after consultation with counsel Melvin Belli. Mr. Belli is said to have advised petitioner and his co-defendants when he represented them at the trespass trial that the order was unconstitutional and should be tested by issuing a statement. Belli also allegedly advised them that it was not necessary to seek modification of the order, that the only way to test it was to issue a statement. Appellant admitted making the statement with knowledge of the pretrial order and with the intent to violate the order, but for the motives stated above (Petition, pp. 8-9).

The settled statement is in direct and unequivocal conflict with the facts revealed in several of petitioner's newspaper exhibits.

The Berkeley Gazette of January 14, 1967, reported the following account by Jerry Rubin, one of petitioner's co-defendants:

> "The group's attorney Melvin Belli, is out of the country according to Rubin, and will not return until late tonight. He admitted yesterday's action was done without consulting Belli."

On January 17, 1967, the Oakland Tribune reported the following statement by Mr. Belli, requesting continuance of arraignment proceedings on the contempt charge:

> "His clients, Belli said, 'felt there had been so much (adverse) publicity . . . and they are vocal and political . . . that they had to say something.' He was out of town so couldn't advise them otherwise."

In light of the glaring contradictions, respondent respectfully submits that the factual record is inadequate to serve as a basis for resolving important constitutional issues. Consequently, it is urged that denial of certiorari is compelled on this ground alone.

II

PETITIONER'S CONTEMPT CONVICTION IS CONSTITUTIONALLY VALID

Seeking reversal of his contempt conviction, petitioner urges this Court to disapprove the pretrial publicity order issued below on the ground that it unduly restricted his constitutional right to discuss publicly the political and social implications of his participation in a civil disturbance giving rise to criminal charges against him. Petitioner apparently would have the Court believe that he violated the order so as to enlighten the public on pressing social issues and to vindicate his First Amendment rights.

We perceive an altogether different purpose. When virtually on the eve of trial, petitioner deliberately defied the trial court's injunction, he made his purpose clear:

> "1. The gag rule comes after the University, Sacramento, and powerful interests in the State have already prejudiced people against us.
>
> ". . .
>
> "The reason for this press conference is that we are making an attempt to insure ourselves a fair and public trial. . . .
>
> ". . . The harm against us is already done; the jury has already been prejudiced. The University; both governors, and hostile elements in the community have already given to the people of California a false view of what occurred. . . . We must speak to the press. We must give the people of the State of California our view of the events. This will not guarantee a fair trial, but it will at least make one more possible."

Interestingly, petitioner lets his real motive slip out in his present petition: "The people had heard the government's side, why should they not hear the other side?" Petition, p. 11.

Petitioner was equally candid in his appeal to the state Court:

> "[A]ppellants' statement constitutes an attempt to redress what appellants believe to be an imbalance in the press coverage of the events at the University."
>
> Appellants' Opening Brief in Court of Appeal, 14.

Petitioner now justifies his "brazenly flagrant flouting of an order obviously made for [his] own protection"[3] by arguments which debilitate *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Until *Sheppard*, this Court struggled vainly to resolve the apparent conflict between the rights of fair trial and free expression. *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947); *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950); *Wood v. Georgia*, 370 U.S. 375 (1962). By applying the "clear and present danger" test in *Bridges*, *Pennekamp*, and *Craig*, the Court effectively removed contempt as a means of controlling the communications media. It was generally believed that those decisions brought into irreconcilable conflict the guarantees of the First and Sixth Amendments, free speech and free press and fair trial.

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[3]Petitioner's Exhibit A, ix.

Sheppard brought a new approach and a new hope: preservation of both free press and fair trial by specific limited judicial restrictions upon speech. The Court showed that the free press-fair trial dilemma is not an unavoidable conflict to be resolved only by preferring one right to the other; it is a potential conflict avoidable by application of procedural devices, including pretrial publicity orders. In effect, the Court acted to interrupt temporarily the media's sources of prejudicial information, impliedly finding a constitutional difference between broadly silencing the press through the unfocused threat of contempt and carefully limiting its information sources.

We urge this Court not to retreat from *Sheppard*, but to continue to entrust to the judiciary, the traditional guardian of First Amendment liberties, the task of securing a fair trial to accused and accuser by issuing pretrial publicity orders when it appears that the Sixth Amendment right otherwise might be lost. Some, mindful of *Bridges* and its progeny, doubt that *Sheppard* means what it says.[4] Denial of the instant petition would bolster their confidence in *Sheppard*.

A. The trial court issued its order upon a clear and present danger that pre-trial publicity would prevent a fair trial by an impartial jury.

Petitioner first contends that the pretrial publicity order constitutes a prior restraint on speech made by the trial court without a specific finding of a "clear

[4]See, *e.g.*, Petitioner's Exhibit A, ix.

and present danger" of prejudice to a fair trial. Petition, pp. 12-13.

We disagree. Petitioner himself has submitted numerous newspaper articles concerning petitioner, his impending trial, and the campus events giving rise to the charges against him. In this material, the California appellate court found evidence adequate to support the implied finding of the trial court that continued pretrial publicity posed a "clear and present danger" to a fair trial. *Hamilton v. Municipal Court*, 270 Cal.App.2d 797, 801-802, 76 Cal.Rptr. 168 (1969).

Indeed, the appellate court applied the "clear and present danger" standard notwithstanding our opposition. Given the procedural safeguards built into a criminal trial, particularly the opportunity to *voir dire* prospective jurors, we emphasized that an accused or his accuser rarely could demonstrate that prejudicial publicity *immediately imperiled* a fair trial. *Cf. Craig v. Harney*, 331 U.S. 367 (1947). One seeking the protection of a judicial order would be forced to wait until the anticipated injury was inflicted. See *Crosswhite v. Municipal Court*, 260 Cal.App.2d 428, 67 Cal.Rptr. 216 (1968). If *actual* prejudice remained the standard for reversal in prejudicial publicity cases, the "clear and present danger" test, as customarily verbalized, would be perfectly workable. However, in *Rideau v. Louisiana*, 373 U.S. 723 (1963), this Court rejected actual prejudice as the exclusive test. An accused now need show only *inherent* prejudice. That is, given massive, pervasive and prejudicial publicity, partiality will be presumed despite

juror's claims of fairmindedness. *Sheppard v. Maxwell, supra.* The standard of reversal in publicity cases is now far more sensitive than is the "clear and present danger" test. To protect defendants against wrongful conviction, and to safeguard the people's one and only opportunity for a fair trial, the standard for protection against prejudicial publicity, we reasoned, should be made to conform with the standard for reversal. A pretrial publicity order would be proper if the trial court reasonably concluded that there otherwise existed a *reasonable likelihood* that pretrial publicity would interfere with the separate rights of accused and accuser to a fair trial by an impartial jury.

We pointed out that none of this Court's decisions applying the "clear and present danger" test in contempt cases involved a jury trial. "[T]he limitations on free speech assume a different proportion when expression is directed toward a trial. . . ." *Wood v. Georgia, supra,* 390. *Bridges, Pennekamp,* and *Craig* did not involve a statutory contempt or willful disobedience of a judicial order. Each of those cases did involve the "unfocused threat" of the contempt power, *Bridges v. California, supra,* 269, applicable not only to the parties but to the press. In contrast, this case involves a narrowly restricted threat of contempt, limited to the parties and excluding the press. Further, those to whom the order is directed are not made to guess at what is forbidden; they are told what is temporarily prohibited. We objected that the "clear and present danger" test imposed a tyranny of labels.

Words—"clear," "present," "immediate," "peril"—cannot substitute for a weighing of competing interests. Our position was well articulated in *Pennekamp v. Florida, supra,* at 336:

> "Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes."

Our view gained the approval of the United States Court of Appeals for the Tenth Circuit, in *United States v. Tijerina,* 412 F.2d 661 (10th Cir. 1969), *cert. denied,* 396 U.S. 867 (1969), decided after *Hamilton.* In affirming a contempt conviction for violation of a pretrial publicity order by criminal defendants, the Court of Appeals rejected the contention that such an order could be entered only if pretrial publicity posed a "clear and present danger" to a fair trial.

> "The order is based on a 'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices." 412 F.2d at 666.

The California Court of Appeal, however, adhered to the "clear and present danger" standards as formulated in *Bridges v. California, supra,* at 263:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Hamilton v. Municipal Court, supra,* at 801.[5]

The substantive evil which the trial court sought to prevent was extremely serious. The People have no recourse from an unfair trial by a prejudiced and partial jury. An accused has but one: reversal and retrial. "[R]eversals are but palliatives . . . ," however, "the cure lies in those remedial measures that will prevent the prejudice at its inception." *Sheppard v. Maxwell, supra,* at 363. Mr. Justice Jackson, dissenting in *Craig v. Harney, supra,* at 394-395, observed that:

> "The right of the people to have a free press is a vital one, but so is the right to have a calm and fair trial free from outside pressures and influences. Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit."

The probability that several of the enjoined parties would issue statements containing prejudicial material was high; the probability that petitioner would

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[5]The Seventh Circuit has yet to determine whether clear and present danger or reasonable likelihood is the test for evaluating the validity of pre-trial publicity orders. *Chase v. Robson,* 435 F.2d 1059, 1061 (7th Cir. 1970). Further, petitioner's reliance on *State ex rel. Superior Court of Snohomish Co. v. Sperry,* 483 P.2d 608 (Wash. 1971), is misplaced. There, the court order applied directly to the press rather than, as here, to its sources. *Compare, Farr v. Superior Court,* 22 Cal.App.3d 60, ____ Cal. Rptr. ____ (1971).

attempt to influence community opinion approached certainty. On December 14, 1966, the Berkeley Daily Gazette reported that upon entering not guilty pleas the day before, petitioner and his associates distributed a mimeographed statement. See Footnote 2, *supra*.

The trial court's judgment that, if left unrestrained, petitioner again would attempt to prejudice the community in his favor was vindicated by the statement issued in violation of the order. In a sensational case featuring nationally known defendants represented by equally prominent counsel, where a party has made earlier efforts to mold public opinion, continued efforts may well succeed. The Court of Appeal correctly concluded that "[t]he imminence of the danger which the [trial] court sought to foreclose is clear." *Hamilton v. Municipal Court, supra,* at 801.

The trial court's response was an order carefully tailored to meet the exigent circumstances. Petitioner's freedom of speech was restricted in a limited and temporary manner. The order was effective only from December 16 until trial, scheduled for January 17. Petitioner was restrained from speaking to the public only as to matters covered by the order. The trial court issued its order in petitioner's presence, and invited the parties to seek a clarification or modification as necessary.

Contrary to his assertion, petitioner was not "gagged" by the pretrial decree. If he sincerely believed he was a victim of political persecution, petitioner could have effectively aired his grievance by

seeking a modification of the order or applying for a writ of prohibition in the appellate courts. Either legal action would guarantee publicity sufficient to satisfy even petitioner.

B. The trial court's duty to insure a fair trial for all parties compelled it to issue a pre-trial publicity order authorized by Sheppard v. Maxwell.

We have so far justified the Court's order as a constitutional accommodation between the People's right to a fair trial and the petitioner's right to speak his mind. The Supreme Court of New Jersey, in *State v. Kavanaugh*, 243 A.2d 225, 231 (1968), identified another compelling interest: the public interest in the integrity of the judicial process. *Cf. United States v. Tijerina*, *supra*, at 666. When, on the eve of trial, a party resorts to the forum provided by the news media, he impugns the integrity of the judicial process. If pre-trial restraints are placed upon the prosecution, as *Sheppard* mandates, but voluble defendants are left free to hold press conferences denouncing the motives of the prosecution, the prosecution's evidence and witnesses, or commenting upon the merits of the case, the public will immediately perceive unfairness. The trial court, having stilled the accuser but not the accused, will no longer be regarded as an impartial tribunal.

The State has a right to a fair trial. *State v. Kavanaugh*, *supra*, at 231. An accused may be enjoined from disseminating before trial information which by its prejudicial nature jeopardizes the public right to a fair trial. *United States v. Tijerina*, *supra*, at 666.

"[J]ustice, though due to the accused, is due to the accuser also." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). A criminal defendant has no right to prejudice the community in his favor even as the prosecution and its witnesses are stilled. "[T]he system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" *Hayes v. Missouri*, 120 U.S. 68, 70 (1887), quoted in *Swain v. Alabama*, 380 U.S. 202, 220 (1965).[9]

In *Sheppard v. Maxwell* this Court declared:

> "The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for the defense, *the accused*, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." *Id.* at 363 (emphasis supplied.) See *id.* at 361.

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[9] That the public is entitled to a fair trial is implicit in decisions recognizing the public's right to a public trial. The latter right, enjoyed by accused and accuser alike, safeguards the independent interests of both in receiving a fair trial. See *Kirkpatrick v. Superior Court*, 143 Cal.App.2d 745, 752 (1956); *United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949); *Singer v. United States*, 380 U.S. 24, 35 (1965).

Jeremy Bentham recognized that the interest of the public in open trial is separate from the interest of the parties themselves. The public's right may not be waived even with judicial consent. "The reason is, that . . . there is a party interested (viz. the public at large) whose interest might, by means of the privacy in question, and a sort of conspiracy, more or less explicit, between the persons concerned (the judge included), be made a sacrifice." Bentham, Rationale of Judicial Evidence (1827), vol. 1, pp. 573-577. *Accord*, 4 U.C.L.A. L.Rev. 475, 477 (1956-1957). And see *Cox v. State*, 238 A.2d 157, 158 (Md. 1968).

Unlike the accused, the People may not seek a change of venue because of prejudicial publicity; unlike the accused, the people have no remedy in reversal because a defendant has prejudiced but one of twelve jurors. In controversial cases, as here, the public's right to a fair trial must rest upon the efficacy of a judicial order made effective by the sanction of contempt. No order could be effective if a defendant is left free to prejudice prospective jurors under the guise of redressing an asserted imbalance of "information. A criminal defendant has other adequate protection against partial jurors including voir dire examination, change of venue, continuance, mistrial, and reversal on appeal.

The Supreme Court of New Jersey recently said of the Canons of Professional Ethics:

> "The ban on statements by the prosecutor and his aids applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence."

State v. Van Duyne, 204 A.2d 841, 852 (New Jersey, 1964). The Canons of Ethics do not apply to defendant personally, but the principle recognized in *Van Duyne* does.

Petitioner urges that fundamental fairness demands that he be permitted publicly to defend his reputation against criminal charges. He was afforded this opportunity when in open court he pleaded not guilty. The pretrial order expressly permits him to publicize his plea. Petitioner further had the opportunity to vin-

dicate himself at trial. To the extent that they conflict, the accused's interest in protecting his reputation in a manner and a time of his own choosing must accede to the public's interest in a fair trial. Otherwise, criminal defendants could and would, without fear of rebuttal, attack the reputation of their victims in the sensitive pretrial period.

Petitioner further contends that the order issued by the trial court prevented him from expressing publicly his opinion on the grievances underlying the demonstration on the Berkeley campus which led to the filing of the original charges against him. This contention is utterly without merit; the order does not limit such discussion. On December 17, 1966, the Berkeley Daily Gazette reported that Judge Brunn, who issued the order, said that it was not designed to halt debate on the campus. Petitioner submitted this news report to the trial court.

It is urged that if pretrial orders are permissible, government will silence its critics by commencing criminal proceedings against them. Petition, 14 n. 7. First, *this order* had no such effect. Petitioner remained free to discuss publicly circumstances underlying University disturbances. Newspaper articles presented by petitioner in the trial court attest to continued public discussion of that subject. Second, pretrial orders are entered by judges, not by prosecutors or public office holders. We are confident that the independent judiciary of this State will remain untainted by the corruption and villainy petitioner would attribute to the executive branch.

C. There is no constitutional requirement that the statements actually made in violation of the order posed a clear and present danger of preventing a fair trial by an impartial jury.

Alternatively, petitioner contends that his contempt conviction should be reversed because there has been no factual showing that the statements actually made by petitioner posed a clear and present danger to a fair trial.

Petitioner profoundly misunderstands the thrust of *Sheppard*. We have indicated at the outset that *Sheppard* takes a new direction. Standards enunciated in *Bridges* for controlling the press are not the standard applicable under *Sheppard* for controlling the sources of information. Contrary to petitioner's view, *Sheppard* does not require a factual showing that the statements actually made affected the fairness of the trial. All that is required to support a contempt conviction is a valid order based upon a clear and present danger to a fair trial and proof that the order has been violated (see *United States v. Tijerina, supra*, 412 F.2d at 666), here by statements "concerning the merits of the complaint, the evidence or arguments to be adduced by either side or trial tactics or strategy."

To require an additional specific showing that each statement made posed a clear and present danger to a fair trial would prevent a court from entering any effective prophylactic order and require it to act as a censor throughout the pretrial period. See, *Hamilton v. Municipal Court*, *supra*, at 801. This would be totally unworkable since trial participants will not always trouble themselves to clear each statement they wish to make with the court, nor should the court be

troubled with each statement contemplated by the participants. It suffices that if the order is valid and petitioner violated it, his contempt conviction must be affirmed.

CONCLUSION

For the stated reasons, we respectfully urge this Court to deny the petition for writ of certiorari.

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February 14, 1972.

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